IN THE

Supreme Court of the United States

TERM, 1949.

No. 877

JAMES T. KEATING,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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SUBJECT INDEX

Table of Cases Cited.

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Your petitioner, James T. Keating, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above cause May 3, 1949 affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division (R. 242).

Your petitioner is further aggrieved by the order of the United States Court of Appeals for the Seventh Circuit denying his petition for rehearing in this cause entered on May 19, 1949. (R. 243).

Opinion Below.

The opinion of the Court of Appeals (R. 234-241) has not been officially reported:

Jurisdiction.

The judgment of the Court of Appeals sought to be reviewed was entered on May 3, 1949 (R. 242). The order of the Court of Appeals denying the petition for re-hearing was entered May 19, 1949 (R. 243). The jurisdiction of this Court is invoked under Section 1254 of the Judiciary and Judicial Procedure Act, Title 28, Section 1254, U.S.C.A. effective September 1, 1948.

The petition for rehearing was denied by the Court of Appeals on May 19, 1949. (R. 243). The time for filing this petition for Writ of Certiorari begins to run from the date the petition for re-hearing was denied (Section 2101 New Title 28 U.S.C.A. Judiciary and Judicial Procedure). *Aspen Mining and Smelting Co.* v. *Billings,* 150 U. S. 31; *Department of Banking* v. *Pink,* 317 U. S. 264.

The decision of the Court of Appeals in this case differs from and is in conflict with decisions of this Court and other Courts of Appeal on the same matters of law.

The Court of Appeals in its decision has decided an important question of local law to-wit, the validity of an arrest for probable cause for the commission of a felony under the laws of the State of Illinois in a way probably in conflict with applicable local decisions. The Court of Appeals in its decision has departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision, by reason of the Court of Appeals refusal to consider the plain error involved in the failure to submit an issue in-

volving jurisdiction of the subject matter to the jury, when it appears that neither the indictment nor the Court's instructions defining the offense, allege or mention the jurisdictional element of the offense, in a case where on another count in which the jurisdictional element was charged and the trial court's instructions concerning that Count included the jurisdictional element, the verdict was not guilty.

In subsequent sections of this petition, your petitioner will show that under the decision of the Court of Appeals he has been denied his Constitutional rights to prosecution by presentment of a Grand Jury, trial by jury on all of the issues, and protection from double jeopardy.

Summary and Short Statement of the Matter Involved.

Indictment.

Your Petitioner was indicted in a four count indictment returned by the Grand Jury for the Northern District of Illinois, Eastern Division, on March 12, 1948. John D. O'Brien was also named as a defendant in said indictment. (R. 2).

Counts 3 and 4 of said indictment were dismissed on motion of the government before submission to the jury. (R. 197).

Both defendants in the trial court were found not guilty on Count one of the indictment and both were found guilty on Count two of the indictment. (R. 214).

Count 1 charged that your petitioner and his co-defendant on November 17, 1947 at Chicago, Illinois did steal, take and carry away twenty-seven cases of butter from a truck trailer of a common carrier while the merchandise was in the care, custody, control and possession of the carrier, and was moving as part of an interstate shipment of freight. (R. 2).

Count 2 charged that the defendants on the same date at Chicago, Illinois did possess twenty-seven cases of butter which was in the course of interstate transportation and which had been stolen theretofore from the care, custody and control of the carrier as the defendants well knew. (R. 3).

Prior to the trial your petitioner and his co-defendant moved to suppress evidence claimed to have been illegally seized without search warrant and to be inadmissible. (R. 8). Evidence was heard upon the motion and the motion was overruled by the District Court. (R. 91).

The Evidence.

The evidence on both the motion to suppress evidence and on the trial was substantially the same and showed the following facts:

The petitioner and his co-defendant were arrested by a police officer of the City of Chicago, shortly after 3:00 a.m. on Monday, November 17, 1947 while walking on a street in the City of Chicago in a lawful and orderly manner. (R. 17). The police officer who made the arrest testified that he made the arrest while investigating the government offense to-wit: a theft from interstate commerce. (R. 33).

At the time of their arrest the police officer interrogated them concerning their identities and activities (R. 18) and compelled them to accompany him about one block south of the place where he accosted them and arrested their progress. At this point, one block south of the arrest, the police officer saw a truck which he suspected of being one that he had seen hastily departing from the scene of the theft that he was investigating. The truck was parked and its cab doors and the open gates of its

body were locked. (R. 20). However, by flashing his light into the truck, the officer saw cartons which were similar to those which he believed to have been stolen a few minutes before the arrest. (R. 20).

The police officer thereupon called his station for help and had the petitioner and his co-defendant locked up at the Stock Yard Police Station in the City of Chicago. When his fellow police officers arrived to take the prisoners to the station, one of them, Officer McInerney recognized the petitioner as an acquaintance and then and there secured an admission that the truck was the property of the petitioner. (R. 25).

At the police station the petitioner and his co-defendant were searched by police officers before being placed in a cell and from time to time thereafter between 3:00 a.m. and 6:00 a.m. were brought out of the cell and searched and asked for keys to the truck. Both denied possession of the keys and the search or searches of their persons did not produce the keys. (R. 47).

Both defendants showed evidence of heavy drinking, and O'Brien, your petitioner's co-defendant, appeared to be more intoxicated. (R. 103).

On interrogation by agents of the F.B.I., who had been called concerning the matter at about 6:00 a.m. on November 17th, your petitioner told the agents that he and his co-defendant, O'Brien, had been drinking in the tavern of one, Zigmond, until about 2:00 a.m. when it closed. That they thereupon drove in your petitioner's truck to another tavern within a block of the theft, and there continued their drinking until about 3:00 a. m., and when they left, Keating discovered that he had lost the keys to his truck, and that the truck had disappeared from the place where they had parked it. That while walking about looking for the truck, they were arrested. (R. 144).

Your petitioner at all times denied possession of the keys to the truck during the time of his arrest and imprisonment. (R. 147).

The truck had been opened and the stolen merchandise taken from it without search warrant and without permission of your petitioner while he was a prisoner in the Stock Yard Police Station and while the truck was being guarded by police officers. The truck was opened by keys in the possession of Officer McInerney who reported in writing to his Superior Officers at about 8:00 a.m., November 17th that he had found the keys on the street near where the truck was parked, which was about a block from where your petitioner was arrested and about a block and one half away from the tavern in which your petitioner and O'Brien had last been drinking. (R. 139). (Ex. 3-3A, Admitted R. 196).

Officer McInerney, however, testified that this report was not true and that he had actually secured the keys from your petitioner, while your petitioner was in his cell at the Stock Yard Police Station, by promising your petitioner that he would conceal the fact that he secured the keys from your petitioner. He further testified that he first revealed that he had secured the keys from Keating rather than on the street as reported, when he was called at his home by an agent of the F.B.I. (R. 136-137).

Other testimony established the interstate character of the shipment of the butter, its identification and the fact that the petitioner and his co-defendant had been drinking at the tavern of one, Zigmond from 8:00 o'clock, Sunday night November 16, 1947 until 2:00 o'clock Monday morning, November 17, 1947, before proceeding in the petitioner's truck to drink at another tavern. (R. 193-194).

It was further proved that the petitioner and his co-defendant were last interrogated on Tuesday morning at about 10:00 a.m. in the office of the U. S. Marshal prior to their arraignment, before the U. S. Commissioner, after 11:00 a.m. on Tuesday, November 18, 1947. (R. 151).

Several police officers testified that they considered the matter to be a Federal matter from its inception because of its interstate character (R. 57, 60) and it was established that the men were held without any charge by the police and turned over to the U. S. Marshal on Tuesday, November 18th. (R. 51, 69).

The petitioner and his co-defendant introduced no evidence other than three exhibits Nos. 1, 2, 3 and 3A, (R. 196, 197) which were respectively two maps of the vicinity of the occurrence and the written official report of Officer McInerney, signed by him, to the effect that he had found the keys to your petitioner's truck on the street near where the truck was parked.

Your petitioner and his co-defendant moved at the close of the government's case for acquittal and their motions were overruled. (R. 195). These motions for acquittal were renewed at the close of all evidence and were again overruled. (R. 200).

Instructions.

After a colloquy on instructions (R. 200) during which the Court indicated some of the instructions he intended to give and entertained suggestions as to instructions, argument was made to the jury. (R. 205).

At the conclusion of the argument, the Court without further discussion instructed the jury orally and sent to the jury the exhibits and the indictment with instruction that only Counts I and II thereof were to be considered. (R. 205-213).

Verdict.

The jury returned a verdict in which it found both defendants not guilty as to Count I, which charged them with theft of property from a truck trailer while the property was moving in interstate commerce; and which verdict found the defendants guilty as to Count II which charged the defendants with possessing property stolen from the care, custody and control of the Safeway Truck Lines while the property was in interstate commerce, as the defendants well knew. (R. 214).

Your petitioner and his co-defendant moved the Court for acquittal notwithstanding the verdict and for a new trial. (R. 220). Both motions were denied (R. 222) and your petitioner and his co-defendant were sentenced to five years each in the custody of the Attorney General. (R. 222).

Matters Urged in the Court of Appeals.

Three matters in chief were urged in the Court of Appeals.

One, that Count II of the indictment was insufficient in that it failed to charge or allege in any manner the place from which the goods were stolen; and that the Court's instructions describing the offense charged in Count II followed the language of the Count and did not submit to the jury the jurisdictional issue as to the place or interstate commerce facility from which the goods were stolen. Under this heading it was further urged that the defendants were deprived of their right to trial by jury on this jurisdictional issue, and that since the indictment did not charge an offense against the United States, your petitioner was not prosecuted by presentment of a Grand Jury for an infamous offense in accordance with the Con-

stitution and further that your petitioner could not sufficiently identify the offense so as to avoid double jeopardy.

The Court of Appeals disposed of this contention by stating that since the sufficiency of the indictment was not raised in the District Court and since the Court found that every essential element of the crime was proved by the evidence, it would not examine the sufficiency of the indictment.

Two, another principal matter urged by your petitioner to the Court of Appeals was that the evidence was insufficient to support the verdict of guilty on Count II because all of the evidence, viewed most favorably to the government, and which tended to establish possession of the stolen property on his part, was circumstantial, and did not directly prove his possession, but could only support an inference that he was the possessor thereof. That, therefore, the inference or conclusion of guilty knowledge on his part could not be based solely upon inferred possession of property recently stolen, even though unexplained. It was, and is, contended, however, that explanation appears is the record from the statements of the petitioner, by the testimony by police officers and an agent of the Federal Bureau of Investigation describing the petitioner's statements to them while in custody, before arraignment. It was contended that the explanation need not come from the defendants' mouths on the witness stand. Under the petitioner's view the trial court's instruction concerning possession of recently stolen property was not appropriate to the evidence and was reversible error.

The Court of Appeals found that under the circumstances, possession of goods so recently stolen was sufficient in the absence of conflicting evidence to explain how

the goods came into the defendant's possession to support the verdict of the jury. (R. 239).

Three, another contention of the petitioner in the Court of Appeals was that the motion to suppress evidence directed to the exclusion of the keys to the petitioner's truck and the property seized on his truck by search without consent or search warrant, while the petitioner was in custody, should have been sustained. The petitioner contended that the acts of the police, who said from the witness stand that they were investigating what they considered to be a Federal matter because of its interstate character, were on behalf of the United States, and that if their acts were unlawful, the United States should not be permitted to use the results of the acts in a Federal prosecution. The Statute providing for the respective venues of the State and the United States was cited, and it was urged that nearly all Federal prosecutions for this offense arise from police arrests and investigations, and that in all cases the Chicago police refer thefts from carriers to the Federal Bureau of Investigation for acceptance or rejection before a State prosecution. It was also contended that the keys to the truck were more of evidentiary character and could not be seized even under lawful arrest.

The Court of Appeals found that the evidence was legally obtained by the state officers incidental to arrest, and found the contention that the evidence could not be used in a Federal prosecution if illegally obtained, was without merit and the evidence could not be suppressed unless it was obtained in such collaboration with Federal officers as to make the unlawful search and seizure an act of both State and Federal officers. It also found that there was no evidence of such collaboration. (R. 241).

Statutes Involved.

The provisions of the Constitution of the United States and the sections of the Statutes of the United States and of the State of Illinois which it is contended are here involved, are set forth in an Appendix hereto. Pertinent portions of the Court's instructions are also included.

Questions Presented.

1. Whether an indictment charging possession of property stolen from the custody and control of an interstate carrier, with knowledge that it was stolen, charges an offense against the United States, where it fails to charge that the property was stolen from one of the places from which thefts from interstate commerce are forbidden, to-wit: a motor truck, wagon, or other vehicle, etc.; and whether there is not a failure to submit a jurisdictional issue to the jury when such a charge is submitted to the jury under instructions which purport to define the offense, but omit the same jurisdictional element of the offense, to-wit, the place from which the property was stolen.

2. Whether a Court of Appeals can properly refuse to pass on whether an indictment charges necessary jurisdictional requirements essential to stating an offense against the United States because it finds that the evidence proved all essential elements, where the trial court in its charge to the jury did not submit such jurisdictional issue to the jury; and whether the Court of Appeals by determination of its own that stolen property possessed by a defendant was stolen from a place designated by the statute, which grants jurisdiction to the United States, can thus add to the jury's verdict—all on the ground that the indictment was not attacked in the trial court.

3. Whether the evidence is sufficient to support a jury verdict of guilty on a charge of knowingly possessing stolen

property, where the possession is not directly proved, but is inferred from circumstantial evidence, and such inferential possession is submitted to the jury by the court's instructions as a basis for drawing the inference of knowledge that it was stolen, in a case where the defendant is found not guilty of the theft, in the same trial, and on the same evidence.

4. Whether evidence, obtained by city police acting to enforce a Federal law, and secured by search of the person of the defendant after illegal arrest and by search of his automobile truck standing still and locked on a city street, and held in the custody of the police, all without search warrant, can be used in a Federal prosecution.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

The decision of the Court of Appeals in this case conflicts with decisions of this Court and other courts of Appeal.

A.

The most apparent conflict with decisions of this Court and other Courts of Appeal is on the question of whether the Court of Appeals properly refused to consider the sufficiency of the indictment with regard to jurisdictional allegations and instructions defining the offense. The Court of Appeals below said,

> "The sufficiency of the indictment is raised here for the first time. The defendants remained silent below. The District Court was given no chance to pass on the question as to the sufficiency of the indictment. We intimate no opinion as to its sufficiency or insufficiency. We hold that its sufficiency cannot be presented here for the first time. *Serra* v. *Mortiga,* 204 U. S. 470, 27 S. Ct. 343, 51 L. Ed. 571. We feel free to apply the rule in this case, because on the whole record we are confident no substantial right of the defendant Keating was invaded and every essential element of the crime was proved by evidence admitted in the case without objection.
>
> On the whole record, we find no error as to the defendant Keating, and as to him the judgment of the District Court is affirmed. As to the defendant O'Brien, the judgment is reversed." (R. 241).

In the case at bar Counts I and II of the indictment were submitted to the jury for decision and the indictment was delivered to the jury to be taken to the jury room for its deliberation. (R. 213). The Court's instructions defining

the offense were given orally, and followed the language of the indictment rather than the language of the Statute. (R. 210). The pertinent instructions are set forth in the Appendix hereto at Pages 3a-6a, thereof.

In the decisions of several Circuits including the Seventh Circuit, to which the Writ of Certiorari here prayed for, would be addressed, it has been held that failure to designate, in the indictment, the place or vehicle from which the goods were stolen is a fatal defect. The decisions say that the averment is a jurisdictional prerequisite, and that the statute, Title 18, Section 409 U.S.C.A., is not a general larceny statute but is aimed at the larceny of a special class of property from particular places.

Wolkoff v. *U. S.*, (C.C.A. 6) 84 F. 2nd 17, sustained a conviction against the plea of former jeopardy, where the prior jeopardy complained of was incurred under an indictment exactly the same as Count II of the indictment at bar in its material allegations. The Court of Appeals for the Sixth Circuit there held that the trial Court had jurisdiction in the second indictment, but not in the first indictment, which failed to designate the place or vehicle from which the goods were stolen. It cited *U. S.* v. *Cohen,* 274 F. 596 (C.C.A. 3); *U. S. Moynihan,* 258 F. 529 (C.C.A. 3), Cf. *Block* v. *United States,* 261 F. 321 (C.C.A. 5); *Kasle* v. *United States,* 233 F. 878 (C.C.A. 6).

In *United States* v. *Cohen,* 274 Fed. 596 the Third Circuit held the statute was not a statute against larceny of personal property generally, but against the larceny of a special class of property from particular places, and that the indictment should charge and the evidence establish that the goods were stolen from some one of the particular places mentioned in the statute, if conviction was to be sustained. In *Beckerman* v. *U. S.* 267 F. 185, Judge Evans

of the Seventh Circuit wrote an opinion in which the conviction was reversed for failure to allege the place from which the merchandise was stolen.

Your petitioner's contention, however, with regard to this defect in the indictment is much broader than the consideration given by the Court of Appeals. Your petitioner contends that by the submission of the indictment physically to the jury, it was afforded visual contrast between the allegations of Count I and Count II of the indictment. In Count I the place from which the property was stolen, to-wit, a truck trailer, was designated (R. 2). In Count II it was not.

The Court's instructions purported to define the offenses alleged or charged in the indictment. (R. 209-211, Appendix Pages 3a-6a). In fact, the Court described the offense in the first count as charging theft of merchandise from a truck trailer while the merchandise was in interstate commerce. In fact, the charge as to the Second Count was that the defendants did possess merchandise stolen from the care, custody and control of a carrier while in interstate commerce.

The jury found your petitioner and his co-defendant not guilty under the Count charging that the goods were stolen from a truck trailer, a place forbidden by the statute, and found them guilty of possessing the goods under a Count, and instructions, which did not designate or place in issue, the place from which the goods were stolen. *Cf. Sealfon* v. *U. S.*, 332 U. S. 575.

Under these circumstances, it is the respectful contention of your petitioner that the District Court by its judgment and the Court of Appeals in its decision added to the jury's verdict a determination by those courts of this jurisdictional issue. Your petitioner contends that Count

II of the indictment and the instructions defining the offense alleged therein, did not submit an offense against the United States for the jury's determination, but only an offense against the State of Illinois.

Your petitioner is not protected against a second prosecution in this cause under an indictment charging possession of the same goods as stolen from a truck trailer, since it could be construed that this conviction was based on evidence that the goods had disappeared or were stolen from the depot or terminal in which the truck trailer was parked. Of course, he is not protected from prosecution for possession of the same goods as stolen from the terminal.

The Court of Appeals (R. 241) takes the narrow view that only the sufficiency of the indictment, not raised below, is in question and invokes as support for a refusal to examine this matter, the case of *Serra* v. *Mortiga,* 204 U. S. 470. That case was a private prosecution for a local offense and was not a prosecution for an infamous crime against the United States requiring prosecution by presentment of a Grand Jury.

There is more here involved than a mere insufficient indictment. There is plain error prejudicing the defendant and denying him a trial by jury under valid indictment submitted to the jury under proper instructions by a Court having jurisdiction of the subject matter.

It is respectfully submitted that the Court of Appeals has rendered a decision in conflict on this point with the decisions of this Court, on the ground that it has determined that the evidence proved all essential elements of the offense. *Screws* v. *U. S.,* 325 U. S. 91; *Bollenbach* v. *U. S.,* 326 U. S. 613; *United Brotherhood* v. *U. S.,* 330 U. S. 395.

B.

The Court of Appeals, in the case at bar, has held that the evidence was sufficient as to your petitioner. It has failed to give consideration in its opinion to the fact that the evidence of possession against your petitioner is purely circumstantial to-wit: that he had in his possession the key to his truck in which the stolen goods were found, and was arrested a block away from the truck presumably shortly after the goods were stolen.

Your petitioner was found not guilty by the jury of the theft of the merchandise involved. Thus his possession is "constructive" possession or implied or inferred possession of the stolen goods in the truck. No proof in the record shows that he ever saw the goods in the truck, nor is his knowledge that it was there directly proved in any manner.

From this inferred possession, the jury was instructed, and the Court of Appeals finds, that the jury had the right to presume or infer his guilty knowledge that it was stolen, on the theory that his possession was unexplained.

It is respectfully contended that the evidence showed sufficient explanation of your petitioner's lack of knowledge concerning the presence or character of the merchandise, all by the testimony of officers who interrogated him and who related the results of their interrogation from the witness stand.

Under these circumstances the recent implied possession was not unexplained and the evidence made the instruction by the trial Court (R. 211), Appendix Page 5a) inappropriate. So was the finding of the Court of Appeals, (R. 239) that the evidence was sufficient to sustain the conviction of the petitioner. Both the trial court and the Court of Appeals apparently labored under the impression that

explanation must come from the testimony of the defendants in such a case, and that their explanations to police officers and F. B. I. agents while under arrest should not be considered. (R. 239).

In any event the Third Circuit Court of Appeals in *U. S.* v. *Russo,* 123 F. 2nd 420, holds that inference cannot be placed upon inference, and that the presumption that possession of recently stolen property is guilty possession should not be based upon mere constructive or implied possession.

It is respectfully submitted that since the circumstance of possession was relied upon to establish the fact of guilty knowledge, then that circumstance of possession should have been directly proved and not presumed or inferred.

C.

The decision of the Court of Appeals in this case is in conflict with the decisions of this court and other Courts of Appeal in its holding that an indictment defective in substance, and failing to allege a jurisdictional element cannot be questioned for the first time on appeal. *Dunbar* v. *U. S.,* 156 U. S. 185; *Harris* v. *U. S.,* 104 F. 2nd 41; *Remus* v. *U. S.,* 29 F. 513; *Shilter* v. *U. S.,* 257 F. 724.

It is respectfully submitted that the failure to question the count of the indictment on which your petitioner was convicted does not bar or preclude examination of the indictment as part of the whole record to determine whether the petitioner was properly convicted under Rule 52 B of the Federal Rules of Criminal Procedure providing that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court." *United Brotherhood* v. *U. S.,* 330 U. S., 395 and cases there cited.

D.

The Court of Appeals in its opinion held that the motion to suppress evidence was properly overruled by the District Court. (R. 239). The Court of Appeals states in its opinion that the arrest took place after the arresting officer saw the butter in the petitioner, Keating's truck.

Actually the arrest took place a block away from the truck. When the officer, Harrington, first accosted the petitioner and his co-defendant, they were walking along the street in an apparently peaceable manner. The officer shined his flashlight upon them from across the street, advanced toward them and arrested their progress. He interrogated them as to their identities and activities and then took them a block south in a direction opposite the one that he testified they were walking when he accosted them. (R. 128).

The officer only had the right to stop and arrest these men if he had knowledge that a felony had been committed and reasonable ground to believe that these men had committed it, under Illinois law. Chap. 38 Smith-Hurd Ill. St. Ann. Section 657 and Section 660. Appendix Page 3a.

The petitioner respectfully contends that the Court of Appeals is in error when it says in its opinion that the arrest took place therafter. (R. 240). The officer had placed the defendants under the dominion of his authority and compelled them to accompany him one block south in a direction opposite to that which they had been travelling. (R. 128). It is not reasonable to contend that the petitioner and his co-defendant invited the officer to accompany them to a place where they knew, under the government's view, that stolen property could be found in the truck belonging to one of them. It is true that the

defendants were there first placed in a police conveyance for transfer to a police station, but that was simply a continuance of the custody begun when the officer accosted and detained them. Since the officer had no knowledge at the first point that cases of butter similar to those he had seen in a truck which he believed had been broken into, were in the petitioner's truck, or even knew petitioner owned a truck, he did not have reasonable ground for believing that the petitioner and his co-defendant had committed a felony. In fact, even after he had seen the butter in the petitioner's truck he did not know that a felony had in fact been committed, but merely suspected that one had been committed because he had seen a truck leave the lot of the Safeway Company at high speed and had seen a trailer on the lot, the door of which gave evidence of having been forced open. (R. 99, 100).

The truck remained in the custody of the police from this point at about 3:00 a.m. until it was opened by a key purportedly procured from the petitioner, again giving the evidence the view most favorable to the government. This search of the truck was without consent of the petitioner and was without search warrant while the truck was standing still. No circumstances of impending flight made it impractical to secure a search warrant for the truck. While it is true that the officers by use of their flashlights, claimed to have been able to determine legends on the cases in the truck, which indicated that they were the same as the butter which later proved to be stolen, this proof alone is not what was admitted. The truck itself was opened without search warrant and the cases therein were seized without search warrant. Thus, even though it may be considered that the search by flashlight from outside the close of the truck was valid, the seizure of the cases of butter cannot be so justified. *U. S.* v. *Di Re,*

332 U. S. 581; *Trupiano* v. *U. S.*, 334 U. S. 699. No excuse or reason has been assigned for the failure to secure a search warrant for the invasion of the truck and the seizure of the contraband or stolen property therein. There is no special statutory power authorizing the seizure of the property involved as contraband or the seizure or search of the truck.

Petitioner further urges in this regard that this search of the truck and seizure of the butter without search warrant, and assertedly under the authority of being an incident of lawful arrest is different from any of the cases known to counsel, in that the petitioner was not arrested on the truck or near it, but a block away from it, and it was not in motion and there was no likelihood of flight. Thus it can hardly be argued that the search of the truck was an incident of the arrest of your petitioner's person.

Another phase of the matter not considered by the Court of Appeals is that while the butter may have been seized as the contraband fruit of crime, the alleged procurement of the keys to the truck from the petitioner is a vastly different matter. The keys to the truck were not disclosed by search of the petitioner's person when he was taken to the police station (R. 47, 49) and in fact the first report of Officer McInerney, who produced the keys, was that he had found them on the street near where the truck was parked. (Ex. 3 and 3A R. 139 and 196). If it is to be considered that McInerney found the keys, as he reported in writing, first, to his superior officers on the Police Department, then the invasion of the truck was a clear trespass without any evidential relationship to the petitioner, but in violation of his right to be secured against unlawful search of his effects.

On the other hand, if the view most favorable to the government's contention was taken, as the Court of Ap-

peals did take it, and it is assumed that McInerney procured the keys by the inducement that he states he gave Keating, petitioner to-wit: that he would conceal Keating's giving them to him so that Keating would not be connected with the crime, made while Keating was held in custody at the police station, then it is contended that under these facts the keys which were merely of evidential character were procured by inducement and the implied threat that the truck would be entered by force and thereby damaged.

The Court of Appeals in its opinion (R. 240) says "Since Keating was arrested for probable cause for commission of a felony, the police officers had a right to search him and they could have found the keys on such forced search."

A search warrant would have described the contraband fruits of the crime or instruments thereof with particularity, and the keys and the evidence of their procurement from Keating's person would not have been included, since the keys and the fact of their possession by the petitioner were merely evidential matters. The Court of Appeals held that there was no evidence of collaboration with Federal officers and that collaboration was necessary. The petitioner contends that the arrest and investigation of this matter was done by the police under a general pattern too apparent from the facts, circumstances and statutes involved, and too much a matter of common knowledge, to be ignored.

A statute of the United States, Title 18, Sec. 410 U.S. C.A. (Appendix 2a) provides that a prosecution in the state court for the offense charged, shall be a bar to prosecution in the Federal Court. Thus if the United States fails to convict, the person charged can be tried in the state court. However, a person tried first in the

State Court and found not guilty cannot then be tried in the Federal Court. Under these circumstances practical law enforcement officers have, as a matter of fact, adopted the practice, pattern, or plan of effecting the first preparation of the matter for a trial by the United States and various police officers testified to circumstances supporting this pattern. (R. 60, 33, 57). An agent of the F.B.I. testified that the Federal Bureau of Investigation received a call regarding the alleged robbery at about 5:00 or 6:00 a.m. on November 17, 1947 from the Chicago Police. (R. 143).

The petitioner and his co-defendant were never arraigned before a state magistrate in accordance with the law of the State of Illinois. Section 660, Chapter 38, (Appendix 3a) and in fact, at the hour when such arraignment should have occurred, were this a state matter rather than Federal, the petitioner and his co-defendant were under interrogation by F.B.I. agents at the police station (R. 151). The men were never charged with a state offense. (R. 69).

It is respectfully submitted that these circumstances should not be ignored where the government does not deny such a pattern or plan of collaboration but merely says that it is not proved. The opinion of the Court of Appeals in this case is in conflict with decisions of this Court. *U. S.* v. *Di Re,* 332 U. S. 588; *U. S.* v. *Trupiano,* 334 U. S. 699.

For the reasons stated in the foregoing discussion, it is respectfully urged that the Court of Appeals has rendered a decision in conflict with decisions of other courts of Appeal on the same matters; and has decided the question of arrest under Illinois law in a way in conflict with applicable local decisions; and has decided an important question of Federal law, to-wit, whether an unlawful ar-

rest and search and seizure by city police under a pattern of co-operation with Federal authorities makes evidence thereby procured subject to suppression, which question has not been but should be settled by this Court; and has decided that question in a way probably in conflict with applicable decisions of this Court; and has departed from the accepted and usual course of judicial proceedings, and sanctioned such departure by the District Court that the exercise of this Court's power of jurisdiction should be invoked.

CONCLUSION.

Your petitioner was sentenced to five years in the custody of the Attorney General. The proof of his constructive possession of stolen merchandise rests practically upon the testimony of a single police officer whose official report to his superiors in writing, and presumably upon his official oath, was contradictory of his trial testimony.

The government, if it has a case, is not precluded from proceeding with its prosecution by a valid and complete presentment by a Grand Jury, under instructions submitting all of the issues to the jury, with the lawful use of lawful testimony and evidence.

While there are errors which were urged in the Court of Appeals for the first time, that Court, and this Court have the power and probably the duty to examine the record for plain and prejudicial error, especially where inconsistent verdicts indicate the prejudice to substantial rights.

Your petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted.

MAURICE J. WALSH,
Counsel for Petitioner.

APPENDIX.

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The pertinent provisions of Title 18, Section 409 USCA are:

"(a) Whoever shall —

* * *

"(2) embezzle, steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any—

(i) railroad car, motortruck, wagon, or other vehicle,

(ii) station house, platform, depot, or terminal,

(iii) steamboat, vessel, or wharf,

(iv) aircraft, airport, aircraft terminal or air navigation facility,

"any goods or property moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, with intent to convert such goods or property to his own use, or shall buy, receive, or have in his possession any such goods or property, knowing the same to have been embezzled or stolen; * * *."

Title 18, Section 410 USCA provides :

"Nothing in section 409 of this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts."

Section 657, Chapter 38 Smith-Hurd Illinois Annotated Statutes provides:

"An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

Section 660, Chapter 38 Smith-Hurd Illinois Annotated Statutes provides:

> "When an arrest is made without a warrant, either by an officer or a private person, the person arrested shall, without unnecessary delay, be taken before the nearest magistrate in the county, who will hear the case, for examination, and the prisoner shall be examined and dealt with as in cases of arrests upon warrant."

The Trial Court's instructions to the jury defining the charge are as follows:

> "The First count of the indictment charges that the defendants, O'Brien and Keating, on or about November 17, 1947, at Chicago, did unlawfully and wilfully steal, take, carry away and conceal certain merchandise from a truck trailer of the Safeway Truck Lines, a common carrier, with intent to convert the said merchandise to their own use, to-wit, twenty-seven cases of butter having a value of, to-wit, $650.00, which merchandise, at the time, was in the care, custody, control and possession of the Safeway Truck Lines, a common carrier, and was moving as and was a part of interstate shipments of freight, consigned and in transit from State Brand Creameries, Inc., West Mason City, Iowa, to Safeway Truck Terminal, Boston, Massachusetts.
>
> The Second count charges that on or about November 17, 1947, the defendants did unlawfully and wilfully possess, with intent to convert to their own use, the twenty-seven cases of butter, described in the first count and charged to have been stolen from the care, custody, and control of the Safeway Truck Lines, in the course of the interstate transportation.
>
> This indictment is based upon a statute of the United States, which, so far as material here, reads:
>
> "* * Whoever shall * * steal or unlawfully take, carry away, or conceal * * from any * * motortruck

* * or other vehicle * * any goods or property, moving as or which are a part of or which constitute an interstate * * shipment of freight * ** with intent to convert such goods or property to his own use, or shall * * have in his possession any such goods or property, knowing the same to have been * * stolen" shall be punished in the manner provided in the statute.

I will read that statute to you again:

> "* * Whoever shall * * steal or unlawfully take, carry away, or conceal * * from any * * motortruck * * or other vehicle * * any goods or property, moving as or which are a part of or which constitute an interstate * * shipment of freight * * with intent to convert such goods or property to his own use, or shall * * have in his possession any such goods or property, knowing the same to have been * * stolen."

Briefly, the charges in the first and second counts of the indictment are that the defendants stole goods from interstate commerce and possessed goods so stolen.

The court instructs you that by an "interstate * * shipment of freight, * * as used in the statute quoted, is meant freight that is moving from one state into or through some other state.

The term "motortruck" as used in the statute means "'truck' truck-tractor, trailer, or semi-trailer."

Before you can find either of these defendants guilty under the first count of the indictment, that is, the count charging theft, you must believe from all the evidence and beyond a reasonable doubt that such defendant unlawfully and wilfully stole, took, carried away and concealed, with intent to convert to his own use and permanently deprive the owner of the goods and property described, substantially as charged, and that at the time such goods were stolen, they were moving as and were a part of an interstate shipment of freight.

Before you can find either of these defendants guilty

under the second count of the indictment, that is, the count charging possession of stolen property, you must believe from all the evidence and beyond a reasonable doubt: That the goods described in such count were stolen with an intent on the part of the thief to convert them to his own use, as charged; that at the time they were stolen, if you so find, they were moving as, or were part of, or constituted an interstate shipment of freight; that the goods, or some of them, came into the possession of such defendant; and that at the time they came into the possession of the defendant he knew that they were stolen goods.

The essence of the crime alleged in the second count, that is, the charge of possessing goods stolen from interstate shipments, is guilty knowledge on the part of the accused that the goods were stolen. It is not a crime to possess stolen property. The crime consists in possessing it, knowing it to have been stolen, and you cannot find either defendant guilty under the second count unlss you believe beyond a reasonable doubt that he knew that the goods were stolen. But it is not necessary to warrant a conviction under this count that the accused knew that the goods were stolen from an interstate freight shipment.

The word "possession" as used in the statute may mean actual manual or personal possession, or it may mean, also, constructive possession, that is, where the goods are shown to have been under the control of the person charged, although they were in the actual physical possession of another.

Possession of property recently stolen, if unexplained, is a circumstance tending to show guilty knowledge on the part of the accused that the goods were stolen, yet if the jury believe from the evidence that such defendant came honestly into the possession of the property, or that the possession by the accused is unconnected with any suspicious circumstances of guilt, this would be a satisfactory account of his pos-

session, and would remove every presumption of guilt growing out of the same. In determining whether or not a defendant in this case had knowledge that the goods were stolen, you should consider all the circumstances attending the possession of the goods by the accused, if you find that they were possessed." (Transcript of Record, Pages 209-211.)